

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

PATH AMERICA, LLC; PATH AMERICA
SNO CO LLC; PATH AMERICA FARMER'S
MARKET, LP; PATH AMERICA KINGCO
LLC; PATH AMERICA TOWER, LP; PATH
TOWER SEATTLE, LP; POTALA TOWER
SEATTLE, LLC; and LOBSANG DARGEY,

Defendants, and,

POTALA SHORELINE, LLC; POTALA
VILLAGE KIRKLAND, LLC; DARGEY
DEVELOPMENT, LLC; DARGEY
ENTERPRISES, LLC; PATH OTHELLO,
LLC; PATH FARMER'S MARKET, LLC; and
DARGEY HOLDINGS, LLC,

Relief Defendants.

Case No. 2:15-cv-01350-JLR

UNOPPOSED MOTION FOR ORDER
APPROVING FOURTH AMENDMENT TO
PURCHASE AND SALE AGREEMENT FOR
SALE OF SHORELINE PROPERTY;
~~PROPOSED~~ ORDER

NOTE ON MOTION CALENDAR:
December 28, 2018

1 **TO ALL INTERESTED PARTIES, THEIR COUNSEL OF RECORD**
 2 **AND THIS HONORABLE COURT:**

3 Michael A. Grassmueck ("Receiver"), the court-appointed Receiver for Path
 4 America LLC, Potlatch Shoreline, LLC ("Shoreline") and related entities
 5 ("Receivership Entities"), hereby moves this Court for an order approving the
 6 purchase and sale agreement and all related amendments and terms set forth therein,
 7 for the pending sale of that certain commercial property in Shoreline, Washington,
 8 defined below. This Court has previously approved the purchase and sale
 9 agreement for this pending sale, as well as three amendments thereto. The
 10 agreement has since been amended again by the parties, subject to Court approval,
 11 to allow buyer one additional option to extend the closing by sixty (60) days, and
 12 this motion thus seeks approval of the purchase and sale agreement and its terms, as
 13 amended.

14 **I. INTRODUCTION AND RELEVANT FACTS**

15 The Receiver was appointed by this Court with full powers of an equity
 16 receiver, and ordered, among other things, to take possession of and assume
 17 authority and control over the assets of the receivership estate, including that certain
 18 commercial property located at 15560 Westminster Way North, Shoreline,
 19 Washington 98133 ("Property"); title to which is presently held by Shoreline.
 20 Declaration of Michael A. Grassmueck filed herewith ("Grassmueck Decl."), ¶ 3.

21 Shortly after his appointment, the Receiver took possession of the Property
 22 and, thereafter, marketed the property for sale through a licensed broker, resulting in
 23 the acceptance of an offer from Maple Multi-Family Land TX, L.P. ("Buyer"). *Id.*
 24 at ¶ 4. On August 4, 2017, the Receiver filed a motion seeking approval of the sale
 25 of the Property ("Sale Motion", Dkt No. 571) to Buyer and approval of the related
 26 Purchase and Sale Agreement and Joint Escrow Instructions ("Purchase and Sale
 27 Agreement") and First Amendment to Purchase and Sale Agreement and Joint
 28

1 Escrow Instructions ("First Amendment to PSA") submitted as Exhibit A to the
 2 Declaration of Michael A. Grassmueck filed concurrently herewith ("Grassmueck
 3 Decl.") as Docket No. 571-1. *Id.* On September 13, 2017, this Court entered an
 4 Order Granting Motion for Order Approving Sale of Shoreline Property as Docket
 5 No. 585 (the "Approval Order"), granting the Receiver's Sale Motion and approving
 6 the Purchase and Sale Agreement and the First Amendment to PSA, and the terms
 7 set forth therein.

8 The Court previously approved two additional amendments to the PSA
 9 pursuant to which Buyer received options to extend the closing date in exchange for
 10 extension fees, additional earnest money deposits, and/or the release of escrowed
 11 funds to the Receiver.¹ See Docket Nos. 618, 643. Grassmueck Decl., ¶¶ 5-6. As
 12 of the date of this filing, the Buyer has exercised all of the extension options,
 13 thereby extending the closing date to December 31, 2018, and has requested an
 14 additional option to further extend the closing to March 1, 2019. *Id.* at ¶ 7.

15 Buyer has informed the Receiver that the lender with whom it had been
 16 negotiating for some time with respect to financing the acquisition and development
 17 of the Property recently and unexpectedly decided not to proceed with the loan.
 18 Grassmueck Decl., ¶ 8. Buyer requested an additional sixty (60) days to line up
 19 replacement financing. Buyer confirmed its commitment to close the transaction,
 20 noting that it had already committed almost \$3.5 million to the project in the form of
 21 earnest money deposits of \$1.5 million and close to \$2 million in development costs
 22 (plans, permits, attorneys' fees, etc.). *Id.* Buyer also provided documentation to the
 23 Receiver concerning the development expenditures, and agreed to provide additional
 24 consideration to the receivership estate. *Id.*

25
 26 ¹ Such amendments were the Second Amendment to Purchase and Sale Agreement and Joint
 27 Escrow Instructions ("Second Amendment to PSA"), a true and correct copy of which is
 28 attached to the Grassmueck Decl. as Exhibit B, and the Third Amendment to Purchase and
 Sale Agreement and Joint Escrow Instructions ("Third Amendment to PSA"), a true and
 correct copy of which is attached to the Grassmueck Decl. as Exhibit C.

1 Thus, the Receiver and Buyer have agreed, subject to this Court's approval, to
 2 allow Buyer an additional extension option to extend the closing of the transaction
 3 by 60 days in exchange for the delivery of a further non-refundable deposit of
 4 \$100,000.00 as well as extension fees in the amount of \$1,000.00 per day, which
 5 agreement is memorialized in a Fourth Amendment to Purchase and Sale Agreement
 6 and Joint Escrow Instructions ("Fourth Amendment to PSA"). *Id.* at ¶ 9, Ex. D.
 7 Given this option, assuming Buyer exercises it and submits the additional deposit
 8 and \$60,000.00 in prospective extension fees to escrow, the final closing date of the
 9 transaction would be on or before March 1, 2019. *Id.* at ¶ 10. If Buyer exercises the
 10 extension option but fails to close the transaction by March 1, 2019, Receiver will
 11 be entitled to keep the non-refundable deposits in the aggregated amount of
 12 \$1,600,000.00. *Id.*

13 The Receiver consulted with counsel for the Securities and Exchange
 14 Commission ("Commission") with respect to the relief sought in this motion, and
 15 counsel confirmed the Commission has no objection. *Id.*, ¶ 13.

16 II. **ARGUMENT**

17 "The power of a district court to impose a receivership or grant other forms of
 18 ancillary relief does not in the first instance depend on a statutory grant of power
 19 from the securities laws. Rather, the authority derives from the inherent power of a
 20 court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369
 21 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly
 22 and efficient administration of the estate by the district court for the benefit of
 23 creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir 1986). As the appointment
 24 of a receiver is authorized by the broad equitable powers of the court, any
 25 distribution of assets must also be done equitably and fairly. *See SEC v. Elliot*,
 26 953 F.2d 1560, 1569 (11th Cir. 1992).

1 District courts have the broad power of a court of equity to determine the
 2 appropriate action in the administration and supervision of an equity receivership.
 3 *See SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). The Ninth
 4 Circuit explained:

5 A district court's power to supervise an equity receivership and
 6 to determine the appropriate action to be taken in the administration
 7 of the receivership is extremely broad. The district court has broad
 8 powers and wide discretion to determine the appropriate relief in an
 9 equity receivership. The basis for this broad deference to the district
 10 court's supervisory role in equity receiverships arises out of the fact
 11 that most receiverships involve multiple parties and complex
 12 transactions. A district court's decision concerning the supervision of
 13 an equitable receivership is reviewed for abuse of discretion.

14 *Id.* (citations omitted); *see also CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115
 15 (9th Cir. 1999) ("This court affords 'broad deference' to the court's supervisory role,
 16 and 'we generally uphold reasonable procedures instituted by the district court that
 17 serve th[e] purpose' of orderly and efficient administration of the receivership for
 18 the benefit of creditors.").

19 Accordingly, this Court has broad equitable powers and discretion in
 20 formulating procedures, schedules and guidelines for administration of the
 21 receivership estate and disposition of receivership assets.

22 In addition, it is generally conceded that a court of equity having custody and
 23 control of property has power to order a sale of the same in its discretion. *See*,
 24 *e.g., Elliott, supra*, 953 F.2d at 1566 (finding that the District Court has broad
 25 powers and wide discretion to determine relief in an equity receivership). "The
 26 power of sale necessarily follows the power to take possession and control of and to
 27 preserve property." *See also SEC v. American Capital Invest., Inc.*, 98 F.3d 1133,
 28 1144 (9th Cir. 1996), *cert. denied* 520 U.S. 1185 (decision abrogated on other
 grounds) (*citing* 2 Ralph Ewing Clark, *Treatise on Law & Practice of Receivers*
 § 482 (3d ed. 1992) (*citing First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887))).

1 "When a court of equity orders property in its custody to be sold, the court itself as
 2 vendor confirms the title in the purchaser." 2 Ralph Ewing Clark, *Treatise on*
 3 *Law & Practice of Receivers* § 487).

4 "A court of equity, under proper circumstances, has the power to order a
 5 receiver to sell property free and clear of all encumbrances." *Miners' Bank of*
 6 *Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (2d Cir. 1933). *See also*, 2 Ralph Ewing
 7 Clark, *Treatise on Law & Practice of Receivers* § 500. To that end, a federal court
 8 is not limited or deprived of any of its equity powers by state statute. *Beet Growers*
 9 *Sugar Co. v. Columbia Trust Co.*, 3 F.2d 755, 757 (9th Cir. 1925) (state statute
 10 allowing time to redeem property after a foreclosure sale not applicable in a
 11 receivership sale).

12 Generally, when a court-appointed receiver is involved, the receiver, as agent
 13 for the court, should conduct the sale of the receivership property. *Blakely Airport*
 14 *Joint Venture II v. Federal Sav. and Loan Ins. Corp.*, 678 F. Supp. 154, 156
 15 (N.D. Tex. 1988). The receiver's sale conveys "good" equitable title enforced by an
 16 injunction against the owner and against parties to the suit. *See* 2 Ralph Ewing
 17 Clark, *Treatise on Law & Practice of Receivers* §§ 342, 344, 482(a), 487, 489, 491.
 18 "In authorizing the sale of property by receivers, courts of equity are vested with
 19 broad discretion as to price and terms." *Gockstetter v. Williams*, 9 F.2d 354, 357
 20 (9th Cir. 1925).

21 **III. DISCUSSION**

22 Here, the Receiver believes, in his reasonable business judgment, that the
 23 terms of the Fourth Amendment to PSA providing an additional 60 day extension
 24 option in exchange for an additional nonrefundable deposit of \$100,000.00 and
 25 extension fees of up to \$60,000.00, are in the best interests of the receivership estate.
 26 Grassmuck Decl. ¶ 11.

1 The Receiver has carefully considered numerous factors in reaching this
2 conclusion, including the goal of expeditiously winding up the receivership and
3 making distributions, the potential risks and benefits of extending the closing date as
4 compared to putting the Property back on the market, the likelihood of the current
5 transaction closing, and the net effect of various scenarios on the amount of funds to
6 be distributed to allowed claimants. A key consideration in the Receiver's analysis
7 is the fact that the net proceeds from the existing transaction, if it closes, will be
8 sufficient to satisfy in full the allowed claim of Binjiang Shoreline Corp. ("BSC") in
9 the amount of \$10,228,154.06. Conversely, if the existing transaction does not close
10 and the net proceeds of a new sale are considerably less, BSC would have a
11 significant allowed claim that could result in a 10-20% reduction in the value of the
12 claims held by all other claimants. Weighing all of the foregoing factors and others,
13 the Receiver determined that the current amendment is in the best interests of the
14 receivership estate. *Id.*

15 Accordingly, the Receiver requests this Court grant this Motion and approve
16 the Purchase and Sale Agreement as amended by the First Amendment to PSA,
17 Second Amendment to PSA, Third Amendment to PSA, Fourth Amendment to PSA
18 and all terms set forth therein.

19 As with the prior amendment, the Receiver respectfully requests the Court
20 issue an order in a form substantially similar to and consistent with the Approval
21 Order. Based on his experience in real estate transactions and consultation with
22 counsel, the Receiver believes a substantially similar order approving the terms of
23 the Purchase and Sale Agreement as amended by the four amendments, and all
24 terms set forth therein, is necessary to avoid potential complications in securing title
25 insurance and addressing other administrative matters associated with closing the
26 sale. *Id.* at ¶ 12. Accordingly, the Receiver submits with this Motion, a Proposed
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1 Order containing substantially the same terms as the Court's prior Approval Order
2 but revised to provide for approval of the terms of the Fourth Amendment to PSA.

3 **IV. CONCLUSION**

4 For the reasons set forth herein, the Receiver respectfully requests entry of an
5 order approving the Purchase and Sale Agreement, as amended by the First
6 Amendment to PSA, Second Amendment to PSA, Third Amendment to PSA,
7 Fourth Amendment to PSA, and all terms set forth therein, on substantially the same
8 terms as this Court's Approval Order entered on September 13, 2017.

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10 Dated: December 13, 2018

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

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12 By: /s/ Michael R. Farrell
13 David R. Zaro, Esq. #124334 (CA)
14 (Pro Hac Vice Granted Oct. 26, 2015)
Michael R. Farrell, Esq. #173831
15 (CA)
(Pro Hac Vice Granted Nov. 6, 2015)
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20 *Attorneys for Receiver*
MICHAEL A. GRASSMUECK

[PROPOSED] ORDER

Before the court is the Receiver ("Receiver") Michael A. Grassmueck's Unopposed Motion for Order Approving Fourth Amendment to Purchase and Sale Agreement for Sale of Shoreline Property. ("Unopposed Motion", (Dkt. #___)). The motion is noted for the court's consideration on December 28, 2018. (*See id.* at title page.) No party has filed an opposition to the motion. (*See generally* Dkt.) The court has reviewed the motion, the relevant portions of the record, and the applicable law. Being fully advised, the court GRANTS the motion and ORDERS as follows:

1. The sale of the commercial property located at 15560 Westminster Way North, Shoreline, Washington 98133 (the "Property"), more specifically described in the Purchase and Sale Agreement and Joint Escrow Instructions as amended by the First Amendment to Purchase and Sale Agreement and Joint Escrow Instructions, Second Amendment to Purchase and Sale Agreement and Joint Escrow Instructions, Third Amendment to Purchase and Sale Agreement and Joint Escrow Instructions and Fourth Amendment to Purchase and Sale Agreement and Joint Escrow Instructions (collectively, the "Purchase and Sale Agreement"), attached as Exhibits A, B, C and D to the Receiver's Declaration (*see* Grassmueck Decl. (Dkt # ___)) ¶¶ 4,5,6 and 9, Exs. A-D), is CONFIRMED and APPROVED;

2. The purchase and sale of the Property to Maple Multi-Family Land TX, LP ("Buyer") shall be on an "As-Is, Where-Is" basis, as set forth in the Purchase and Sale Agreement;

3. The court further finds as follows:

a. The negotiation, execution, delivery, and consummation of the Purchase and Sale Agreement was conducted in a manner appropriate under applicable law;

1 b. The Receiver has provided adequate and sufficient notice for the
2 Unopposed Motion;

3 c. The consummation of the sale of the Property is in the best
4 interests of the estate of the Receivership Entities;

5 d. Buyer has acted in good faith, the purchase and sale is
6 undertaken by Buyer and the Receiver at arm's length, without
7 collusion and in good faith, and Buyer is entitled to appropriate
8 protections on account thereof;

9 4. The purchase price of \$11,500,000 for the Property is CONFIRMED
10 and APPROVED;

11 5. The Receiver is authorized, empowered and directed to immediately
12 pay, upon closing of the sale, a commission of 1% of the final purchase price to
13 broker Berkadia Real Estate Advisors;

14 6. If applicable, the Receiver is authorized, empowered and directed to
15 pay the "Buyer's Costs" as defined in the Purchase and Sale Agreement within ten
16 (10) business days following closing to a third-party or delivery of Buyer's
17 Termination Notice as defined in the Purchase and Sale Agreement;

18 7. The sale of the Property to Buyer (i) is legal, valid and effectively
19 transfers the Property; (ii) will vest Buyer with all right, title and interest to the
20 Property free and clear of all "Removable Liens," other than "Permitted
21 Exceptions," as those terms are defined in the Purchase and Sale Agreement; and
22 (iii) constitutes a transfer for reasonably equivalent value and fair consideration
23 under the laws of Washington state;

24 8. Upon and after the closing of the purchase and sale contemplated
25 herein, claims arising out of any security interests or other liens, if any, against the
26 Property shall attach to the net proceeds of the purchase and sale in the same amount
27 and priority as such security interests and other liens had against the Property prior
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1 to the purchase and sale, and the rights of creditors against third parties, such as
2 claims against guarantors of any debt owed by a Receivership Entity shall not be
3 affected by this purchase and sale;

4 9. All persons holding or asserting a claim, of any nature, against a
5 Receivership Entity, shall be barred from taking any actions against Buyer (as they
6 existed immediately prior to closing of the purchase and sale) or the Property to
7 recover such claim;

8 10. Upon and after the closing of the purchase and sale contemplated
9 herein, Buyer shall not be deemed to be (i) a successor to any Receivership Entity;
10 (ii) a continuation of any Receivership Entity; or (iii) to have assumed any liability
11 with respect to any claim, known or unknown, against any Receivership Entity or
12 the estate of the Receivership Entities, except those expressly assumed in the
13 Purchase and Sale Agreement;

14 11. The provisions of this Order are non-severable and mutually dependent;

15 12. The Receiver is immediately authorized, empowered and directed to
16 complete, consummate, and close the sale transaction, including executing any and
17 all documents as may be necessary and appropriate to do so;

18 13. The Receiver is further authorized, empowered and directed to execute
19 and acknowledge the deed in the form attached in the Purchase and Sale Agreement
20 as Exhibit D;

21 14. The Receiver is further authorized, empowered and directed to transfer
22 title and possession of the Property to Buyer and turnover possession of the Property
23 to Buyer upon closing;

24 15. The Receiver may amend or otherwise modify the Purchase and Sale
25 Agreement if Buyer or its designee consents in writing;

26 16. The terms of this Order shall be controlling but for subsequent
27 immaterial amendments or modifications to the Purchase and Sale Agreement;

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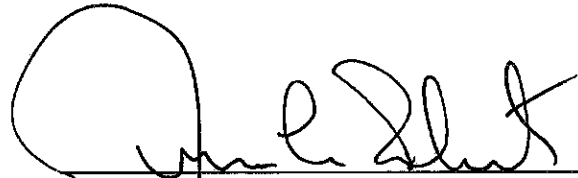
1 17. This Order shall be recorded; and

2 18. This Court retains exclusive jurisdiction to interpret and enforce the
3 provisions of the Purchase and Sale Agreement and this Order, in all respects.

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IT IS SO ORDERED.

Dated: December 31, 2018



Hon. James L. Robart
Judge, United States District Court

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

Dated: December 13, 2018

/s/ Michael R. Farrell
Michael R. Farrell, Esq. #173831 (CA)
(Pro Hac Vice Granted Nov. 6, 2015)